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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

FEDERAL ELECTION COMMISSION,

Petitioner,

—v.—

CHRISTINE BEAUMONT, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*

With the consent of the parties, the Brennan Center for Justice at NYU School of Law submits this brief *amicus curiae* in support of the Petitioner.[1] The letters of consent have been filed with the Clerk of the Court.

The Brennan Center is a nonpartisan institute dedicated to a vision of inclusive and effective democracy. The Center unites the intellectual resources of the academy with the pragmatic expertise of the bar in an effort to assist courts, legislatures, and citizens in developing practical solutions to difficult problems in areas of special concern to Justice William J. Brennan, Jr. The Center has participated as *amicus curiae* or as counsel for a party or *amici* in a number of campaign finance cases decided by this Court, including *FEC v. Colorado Republican Federal Campaign Committee* (*I* and *II*) and *Nixon v. Shrink Missouri Government PAC*, and is part of the legal team defending the Bipartisan Campaign Reform Act in *McConnell v. FEC*, Civ. No. 02-582 (CKK, KLH, RJL) (D.D.C.) (three-judge court), which is expected to reach this Court on appeal later this term. The Center takes an interest in this case because the Fourth Circuit's relaxed interpretation of *FEC v. Massachusetts Citizens for Life, Inc.* creates a serious risk that corporations and unions will exploit nonprofit organizations to circumvent electioneering bans of long standing and clear constitutionality.

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[1]Pursuant to Supreme Court Rule 37.6, *Amicus* states that no counsel for a party authorized this brief in whole or in part and that no person or entity other than *Amicus*, its members, and its counsel contributed monetarily to the preparation or submission of this brief.

INTRODUCTORY STATEMENT AND SUMMARY OF ARGUMENT

A bedrock principle of federal campaign finance law is that corporate and union money should not be allowed to influence candidate elections. Congress banned corporations from contributing to campaigns nearly a century ago. More than 50 years ago, Congress added an additional prohibition on corporate expenditures on behalf of federal candidates and extended these prohibitions to unions as well. This Court has repeatedly recognized the constitutionality of these restrictions, even as applied to nonprofit corporations, carving from them only a narrow exception in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) ("*MCFL*"). *MCFL* permits electioneering expenditures exclusively by small, ideological nonprofits with, among other things, policies against accepting corporate or union donations. *See id.* at 263-64.

This Court's holding in *MCFL* clearly and unambiguously authorized only expenditures, not campaign contributions, and applied only to nonprofit corporations that have policies against accepting any corporate or union donations. Notwithstanding those express limitations, the Fourth Circuit has now *twice* expanded the exemption for nonprofit electioneering. First, *North Carolina Right to Life, Inc., v. Bartlett* allowed a nonprofit that *does* accept corporate or union contributions to benefit from the exception. *See* 168 F.3d 705, 714 (4th Cir. 1999). Second, *Beaumont v. FEC*, now subject to this Court's review, permitted that nonprofit to make not only independent expenditures but also contributions directly to campaigns. *See* 278 F.3d 261, 277 (4th Cir. 2002). Where *MCFL* rightly carved out a narrow exception for expenditures by nonprofit corporations that neither pose a direct threat of corruption nor potentially serve as conduits for corporate or union wealth, the

Fourth Circuit's interpretations create loopholes that threaten to undermine the integrity of the federal campaign finance system.

Extending *MCFL* to include contributions as well as expenditures opens opportunities for circumvention of campaign contribution limits that have been upheld as constitutional since *Buckley v. Valeo*, 424 U.S. 1 (1976). Under the Fourth Circuit rulings, a wealthy donor who has already contributed the maximum permitted amount to favored candidates can then give an unlimited amount to *MCFL* organizations that funnel the money to the same candidates. Even more troubling, corporations and unions that are barred from electioneering can launder their treasury funds through those organizations and exert otherwise unlawful influence on federal candidates.

The Brennan Center supports the Petitioner in seeking reversal of the Fourth Circuit's decision in *Beaumont*. This Court's decisions plainly foreclose the *Beaumont* court's second expansion of the *MCFL* exception. The Center submits this brief *amicus curiae* to urge this Court to reaffirm the explicit, original contours of that exception and, in closing the loophole opened in *Beaumont*, also to confirm specifically that nonprofits are entitled to the benefit of an *MCFL* exemption only if they accept no corporate or union funding.

In other words, this Court should use this opportunity to insist that *MCFL* meant what it said. Although this Court has consistently held that *MCFL* groups may accept no corporate or union money, several courts of appeal in addition to the Fourth Circuit have adopted more permissive standards. Some circuits extend the *MCFL* exemption to groups that receive less than a certain absolute dollar amount of corporate or union contributions. The Fourth Circuit treats as *MCFL* organizations groups that receive only a "modest" percentage of their revenue

from corporations or unions. In deciding this case, this Court should firmly reject both of these misinterpretations of *MCFL* and reaffirm that *MCFL* groups may accept no corporate or union money.

Only a complete ban on corporate and union contributions to *MCFL* organizations would prevent corporations and unions from funneling millions of dollars through nonprofit groups into electioneering activities.[2] The Fourth Circuit's rule would allow some groups to accept millions of dollars of corporate or union money, which could be used for independent expenditures or even given directly to candidates' campaigns. The amount-based rules adopted by other circuits, while opening smaller loopholes than the Fourth Circuit's approach, would still subject federal law to extensive manipulation and circumvention. Only by reiterating the basic principle that *MCFL* applies exclusively to organizations that accept no corporate or union contributions can this Court protect federal elections from the influence of vast aggregations of corporate and union money.

[2]Nonprofit groups receive hundreds of billions of dollars annually, and some individual nonprofit groups receive more than $100 million. Even small percentages of those amounts would be millions of dollars. For a detailed discussion, see Point II.A, *infra*.

ARGUMENT

I.

CIRCUIT COURT INTERPRETATIONS OF *MCFL* IGNORE THIS COURT'S CLEAR RULINGS.

Federal campaign finance law categorically bans the use of corporate and union money to influence candidate elections. This Court recognized a narrow exception to this rule in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) ("*MCFL*"), permitting nonprofit corporations that do not accept funds from corporations or unions to make campaign expenditures (but not contributions). In *Austin v. Michigan Chamber of Commerce*, this Court again stressed that nonprofits may make expenditures under the *MCFL* exemption only if they have a policy against accepting corporate or union donations. *See* 494 U.S. 652, 664-65 (1990). Subsequent circuit court opinions expanding the *MCFL* exception defy the plain holdings of this Court's precedents.

A. This Court Has Consistently and Unambiguously Restricted the *MCFL* Exception to Nonprofits That Refuse Corporate and Union Contributions.

To guard against the real and perceived corrupting influence of aggregations of wealth on elected officials and electoral processes, federal campaign finance law has long relied on an outright ban on the use of corporate and union treasury funds for electioneering purposes. Corporations have been barred from contributing to federal campaigns since 1907. *See* Federal Corrupt Practices Act, Pub. L. No. 59-36, 34 Stat. 864-65 (1907). Congress extended the ban to unions in 1947 and broadened the restriction to prohibit corporate or union expenditures to influence a federal election. *See* Labor

Management Relations Act of 1947, Pub. L. No. 80-101, § 304, 61 Stat. 159. In upholding campaign finance restrictions against constitutional challenges, this Court has repeatedly acknowledged the compelling state interests that these laws serve. *See Austin*, 494 U.S. at 658-61; *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 209-10 (1982); *see also Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 415-16 (1972) (noting that Congress barred labor unions from making campaign expenditures in order to "eliminate the effect of aggregated wealth on federal elections"); *United States v. UAW-CIO*, 352 U.S. 567, 578-79 (1957) (detailing congressional intent behind the proscription on electoral activity funded from the "huge war chests being maintained by labor unions").

The Court carved out a narrow exception from these bans in *MCFL*. The plaintiff in that case, Massachusetts Citizens for Life, Inc. ("MCFL"), was a small nonprofit corporation that financed its political advocacy entirely with individual donations, solicited in part through "various fundraising activities such as garage sales, bake sales, dances, raffles, and picnics." 479 U.S. at 242. The *MCFL* Court noted that such organizations "may not find it feasible to establish" a political action committee ("PAC") through which to finance campaign expenditures, because "[d]etailed record-keeping and disclosure obligations, along with the duty to appoint a treasurer and custodian of the records, impose administrative costs that many small entities may be unable to bear." *Id.* at 254-55 & n.8. Recognizing the First Amendment burden that the ban on corporate expenditures placed on nonprofits like MCFL, and pointedly noting that MCFL's policy of not accepting corporate or union funding "prevents such corporations from serving as conduits for the type of direct spending that creates a threat to the political marketplace," the *MCFL* Court ruled that small, ideological nonprofit corporations that receive no corporate or

union support are constitutionally exempt from the general ban on corporate expenditures in federal elections. *Id.* at 264.[3]

MCFL unambiguously delineates three characteristics that qualify a nonprofit for an exemption from the ban on using corporate treasury funds for campaign expenditures. An *MCFL* nonprofit must be "formed for the express purpose of promoting political ideas" and cannot engage in any business activities. *Id.* Second, it must have "no shareholders or other persons affiliated so as to have a claim on its assets or earnings." *Id.* Finally, but most importantly for this case, an *MCFL* nonprofit must have a "policy not to accept contributions" from business corporations or labor unions and must not be established or controlled by such an entity. *Id.* This Court described all three of those features as "essential to [its] holding." *Id.* at 263.

This Court reaffirmed in *Austin* that a nonprofit's entitlement to the *MCFL* exception depends on a policy against accepting corporate contributions. *See Austin*, 494 U.S. at 664-65. The *Austin* Court rejected the Michigan State Chamber of Commerce's argument that it ought to be treated as an *MCFL* organization, stressing that the factors enumerated in *MCFL* were "essential" and that the Constitution does not require exempting nonprofit organizations that do "not share these *crucial* factors." *Id.* at 662 (emphasis added). The *Austin* Court specifically considered the ability of business corporations to "circumvent . . . restrictions by funneling money through the Chamber's general treasury" and noted that if groups like the Chamber were excepted, they could "serve as a conduit for

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[3]The Court also stressed the important distinction between campaign expenditures, which *MCFL* organizations may make, and contributions, which they may not. *See* 479 U.S. at 259-60 (distinguishing *Nat'l Right to Work Comm.*).

corporate political spending." *Id.* at 664. While the Chamber received extensive funding from corporations, *Austin*'s concern about preventing nonprofits from transforming *MCFL*'s narrow exception into a gaping loophole also applies in the case now before this Court.

In sum, both *MCFL* and *Austin* define a very limited exception in wholly unambiguous terms. *See Faucher v. FEC*, 743 F. Supp. 64, 69 (D. Me. 1990) ("In *FEC v. Massachusetts Citizens for Life*, the Supreme Court made clear that one of the 'essential' factors for its holding was that the nonprofit corporation there did not receive, *and had a policy of not receiving*, any corporate funds."). The FEC has in turn codified the three unambiguous criteria for the exemption in regulations that safeguard the general, long-standing rule that corporate and union treasury funds may not be used for electioneering, regardless of whether they pass through intermediaries. *See* 11 C.F.R. § 114.10. To prevent widespread circumvention of that rule, this Court should now reaffirm its prior unequivocal holdings.

B. Appellate Courts Have Misinterpreted *MCFL* to Allow Exemptions for Nonprofits That Do Accept Corporate or Union Money.

Increasingly, lower federal courts have disregarded the plain language of this Court's decisions and have arrogated to themselves the authority to expand the scope of the *MCFL* exception. *See FEC v. Nat'l Rifle Ass'n*, 254 F.3d 173, 192 (D.C. Cir. 2001); *N.C. Right to Life, Inc., v. Bartlett*, 168 F.3d 705, 714 (4th Cir. 1999); *FEC v. Survival Educ. Fund, Inc.*, 65 F.3d 285 (2d Cir. 1995); *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994). The Second and Eighth Circuits allow nonprofits the benefit of the exemption as long as they do not receive "any significant contributions" from corporations or unions, without

clarifying what "significant" means. The D.C. Circuit also adopted this approach but fixed a specific annual cap on the amount that may be received. The Fourth Circuit invented an even more lax standard, applying the *MCFL* exception to groups that receive only a "modest percentage" of their income from corporations and unions. All of these interpretations contradict this Court's prior holdings and defeat their purpose.

The Second and Eighth Circuits have both stated that whether a group should be covered by the *MCFL* exception depends on whether it receives "any significant contributions" from corporations or unions. *Survival Educ. Fund*, 65 F.3d at 292; *Day*, 34 F.3d at 1364-65. While neither opinion clearly explains how to determine whether contributions are "significant," the statement that courts "should focus upon the amount" of corporate or union money received inherently implies an absolute standard, rather than a percentage of the group's revenues. *Survival Educ. Fund*, 65 F.3d at 292 (internal quotation marks omitted). Whatever that sum may be, it can be funneled in its entirety through the nonprofit advocacy group into federal political races.

The D.C. Circuit adopted the clearest version of this amount-based rule, concluding that the National Rifle Association qualified for the exception in a year when it received $1,000 from corporations, but did not qualify in other years when it received $7,000 or $39,000.[4] *NRA*, 254 F.3d at

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[4]Although the D.C. Circuit's test is clearer than the other standards, its year-by-year application is an invitation to abuse. Not only will it impose insuperable obstacles to enforcement, but this approach would also allow a group to accept unlimited amounts of corporate or union money in one year, save the money as a budgetary surplus, and then spend the money on electioneering in a subsequent year when the organization received only small amounts of corporate or union money. The two-year federal election cycle makes this threat particularly severe. The *MCFL* exception should

192. In adopting this rule, the D.C. Circuit specifically rejected the argument that the percentage of a group's revenues from corporations or unions should determine whether the group qualified for the *MCFL* exemption. *Id.* The D.C. Circuit correctly recognized that a percentage-based rule would allow wealthy nonprofits like the NRA to serve as conduits for large amounts of corporate and union money.

The Fourth Circuit's construal of *MCFL* is the loosest and most subject to abuse of any of the appellate court interpretations. The Fourth Circuit allows ideological nonprofit corporations to claim the *MCFL* exemption so long as corporate or union donations represent what the court characterized as a "modest percentage" of the nonprofit's total revenues. *Bartlett*, 168 F.3d 705, 714. *Bartlett* held that eight percent was not a substantial portion of North Carolina Right to Life's revenue, *id.*, but gave no indication of what percentage would disqualify a nonprofit group from invoking the *MCFL* exception.[5]

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apply only to groups that make it a policy to refuse corporate and union support.

[5]The Fourth Circuit also suggested that the corporate contributions to North Carolina Right to Life should be given special campaign finance treatment, because they come from LifeLine Communications, which describes itself as "a global telecommunications company dedicated to supporting your favorite Christian ministries," LifeLine Communications, "LifeLine Communications," *at* http://www.lifeline.net (HTML source, description metatag) (last visited Dec. 27, 2002), and allows its customers to designate recipients for its donations. *See Beaumont*, 278 F.3d at 273; *Bartlett*, 168 F.3d at 714. LifeLine's contributions should be treated the same as those of any other corporation that uses well-publicized philanthropy to build good will among consumers. LifeLine determines the size of donations, creates the list of eligible recipients, and receives the benefit of any tax deduction.

Treating contributions through telephone plans, credit cards, or similar programs as individual rather than corporate contributions would further widen the loopholes that the Fourth Circuit has already opened. Because the contributions are not tracked to the individual consumers, the donors could circumvent campaign contribution limits by funneling the money through the corporate program. The consumer and the corporation could each launder the other's connection from the money: For purposes of the ban on corporate contributions, the money would be treated as the consumer's individual contribution, while for purposes of individual contribution limits, the donation would be treated as coming from the corporation. To prevent manipulations like this and accurately to categorize donations, LifeLine's corporate "Give Back" program and others like it should be treated as corporate contributions.

The express terms of *MCFL* refute the lower courts' expansive interpretations. In carving its carefully circumscribed exception for MCFL, this Court insisted that the plaintiff had "three features essential to [its] holding" in the case. *MCFL*, 479 U.S. at 263. The decision therefore cannot reasonably be interpreted merely as "an application, in three parts, of First Amendment jurisprudence to the facts." *Bartlett*, 168 F.3d at 714 (quoting *Day*, 34 F.3d at 1363). A policy against accepting corporate or union contributions "prevents [*MCFL* organizations] from serving as conduits for the type of direct spending that creates a threat to the political marketplace," *MCFL*, 479 U.S. at 264, and maintains the traditional rule that corporations and unions can neither contribute to nor spend treasury funds on behalf of federal political campaigns. *See Austin*, 494 U.S. at 661; *Nat'l Right to Work Comm.*, 459 U.S. at 209-10. This Court's unambiguous, categorical requirements foreclose the relaxed approaches advanced by the courts of appeals.[6]

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[6]In addition to contradicting this Court's precedent, the Fourth Circuit rule is inconsistent with the rule of the D.C., Second, and Eighth Circuits. Indeed, the D.C. Circuit expressly considered and rejected *Bartlett*'s holding as inconsistent with *MCFL*'s concerns about preventing nonprofits from serving as conduits for corporate money. *See NRA*, 254 F.3d at 192. Furthermore, the vague standards proposed by the circuit courts, other than the D.C. Circuit, invite extensive litigation to determine whether an organization receives substantial revenue from corporate or

II.

THIS COURT SHOULD REAFFIRM THAT IT MEANT WHAT IT SAID IN *MCFL*.

As has been demonstrated repeatedly, perhaps most notably through the recent but overwhelming deluge of soft money, political groups exploit even small leaks in the campaign finance framework until a trickle of evasion becomes a flood, undercutting the entire campaign finance structure. By creating a loophole that allows some corporate and union money to be spent on campaign expenditures, the circuit courts identified above allow clever manipulations to eviscerate the limits on corporate and union electioneering. Prior decisions of this Court uniformly recognized that the danger of circumvention of valid campaign finance regulations provides a compelling reason for prophylactic rules. *See, e.g., FEC v. Colo. Repub. Fed. Campaign Comm.*, 533 U.S. 431, 456 (2001); *Austin*, 494 U.S. at 664; *Buckley v. Valeo*, 424 U.S. 1, 38 (1976). This Court should eliminate the risk of evasion presented by the circuit courts' loopholes by firmly reiterating that *MCFL* carved out an exception only for grassroots organizations that could not serve as conduits for any corporate or union treasury funds.

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union sources. *See NRA*, 254 F.3d 173 (resolving issue of whether NRA qualified for *MCFL* exception nearly 20 years after receipt of the corporate funds). The burden such a regime would place on the FEC would make fair and effective enforcement difficult, if not impossible.

A. Extending the *MCFL* Exemption to Nonprofits That Accept a "Modest" Percentage of Their Revenues from Corporations and Unions Potentially Allows Millions of Dollars of Corporate and Union Money to Flow into Federal Electioneering.

Any standard based on a percentage of income would demolish the principle that corporate and union money should not be used in federal election campaigns. The nonprofit sector, even when limited to ideological organizations, is sufficiently large to allow corporations and unions to pass large sums into federal electioneering, regardless of what percentage limit applies. Under the Fourth Circuit's rule, the National Rifle Association alone would be able to accept more than $10 million from corporate or union treasury funds to finance electioneering. As the political system adjusted to that rule, the loophole would grow even larger.

Nonprofit organizations that are tax-exempt under sections 501(c)(3) or 501(c)(4) of the Internal Revenue Code and religious congregations received $664.8 billion in 1997, the last year for which such figures were available. *See* Independent Sector, *The New Nonprofit Almanac IN BRIEF* at 7, available online at http://www.independentsector.org/PDFs/inbrief.pdf (2001). Approximately 11 percent of the organizations counted were, like respondent North Carolina Right to Life, social welfare organizations under section 501(c)(4), which are frequently advocacy organizations. *See id.* at 7. Although it is not possible to calculate the precise effect of the Fourth Circuit's rule, even conservative estimates show that it could allow vast quantities of corporate and union money to influence federal campaigns. If even one percent of the nonprofit sector's annual revenue ($6.6 billion out of the $664.8 billion total) flowed to nonprofits satisfying the Fourth Circuit's rule, more than $500 million of corporate or union money (eight percent

of $6.6 billion) could be spent on otherwise unlawful electioneering.

If this estimate appears farfetched, consider the following example. In 2000, the National Rifle Association received approximately $385,000 from corporate donors, as compared to individual contributions of $140 million. Opening Brief for Plaintiff NRA at 2, *McConnell v. FEC*, Civ. No. 02-582 (CKK, KLH, RJL) (D.D.C.) (three-judge court), *available at* http://www.camlc.org/advocacy-court2-34.html. The NRA therefore should not qualify for an *MCFL* exemption from the federal ban on corporate electioneering. Under the Fourth Circuit's interpretation of *MCFL*, however, the NRA would not only qualify for the exemption but could also accept an additional $12 million of corporate or union contributions to spend in federal campaigns. Under the Fourth Circuit's rules, organizations like the NRA could become giant laundries – taking in large aggregations of corporate and union money, washing away campaign finance restrictions, and then funneling the money into campaigns for federal office.

Moreover, the money that could be laundered through nonprofits from their current revenue streams would likely represent only the tip of the iceberg. Under the Fourth Circuit rule, wealthy individual donors could leverage their political influence by giving to nonprofit groups that engage in electioneering.[7] By increasing the nonprofit's revenues from

[7]In recent elections, political parties have encouraged major donors to fund advocacy groups that produce sham issue ads – electioneering advertisements that escape campaign finance regulation. *See, e.g.*, Decl. of Steven T. Kirsch at ¶¶ 6, 10, *McConnell v. FEC*, Civ No. 02-582 (CKK, KLH, RJL) (D.D.C.) (three-judge court), *available at* http://www.camlc.org/advocacy-court2-31.html (testifying that he made six-figure contributions to groups that were running effective ads against George W. Bush, such as the National Abortion Rights Action League, upon the

individual contributions, the wealthy donors would increase the amount of corporate or union money the group could accept, in effect increasing the size of the individual donation by at least eight percent. If the Fourth Circuit rule is left undisturbed, wealthy individuals, corporations, and unions will have every incentive to exploit the new loophole for treasury funds routed through nonprofit advocacy groups: large individual donors could give to nonprofits that participate in electioneering, allowing corporations and unions to give more to those groups, increasing the otherwise prohibited flow of corporate and union funds into federal campaigns.

In addition, corporations and unions can ensure that their contributions to *MCFL* groups operating under the Fourth Circuit rule are used largely, if not entirely, for electioneering. A potential corporate or union donor could identify nonprofits committed to electing certain candidates before deciding where to send its funds. The nonprofit, informed by the corporation or union of their mutual electoral interest, would in turn have every reason to use the new corporate or union funds to influence the relevant elections. If the money flowed elsewhere, the donor could simply give its next donation to a nonprofit that would use the money for campaign purposes. Even without explicit earmarking of contributions, or any misconduct by donor or recipient, nonprofit groups could thus become direct conduits for corporate and union money because allowing themselves to serve as conduits would also further

advice of national Democratic Party). The ability to direct large aggregations of wealth to such purposes, or to make unlimited contributions to political parties, may explain why the loopholes created by the relaxations of *MCFL* have not yet been exploited more widely. But as the Bipartisan Campaign Reform Act closes down the soft money option and brings sham issue advocacy within the scope of federal campaign finance law, the parties and their donors are likely to seize on the Fourth Circuit's rule, accelerating evasion, albeit in a new form.

their political missions. The Fourth Circuit rule thus promises not only to corrupt federal elections but also to undermine the integrity of nonprofits that otherwise serve an important role in enhancing political debate.

In sum, whereas this Court has explicitly required that nonprofit corporations refuse all corporate and union contributions to avail themselves of the *MCFL* exception, the Fourth Circuit rule would allow hundreds of millions of dollars of corporate and union money to flow through nonprofit conduits into federal campaigns. Allowing the Fourth Circuit's rule to stand would undermine the principle that the vast aggregations of wealth amassed by corporations and unions ought not enter the political arena. This Court should reverse the opinion below and make clear that *MCFL* organizations can accept no corporate or union donations.

B. Extending the *MCFL* Exemption to Nonprofits That Accept a Limited Total Amount of Corporate or Union Funds Also Invites Circumvention of Federal Campaign Finance Law.

Even standards such as those adopted by the D.C., Second, and Eighth Circuits allow easy circumvention of the rules barring corporations and unions from electioneering. With the current number of nonprofit advocacy organizations, millions of dollars of corporate and union treasury funds would flow into the federal electoral system. As qualifying groups restructured to take advantage of the new rule, the amount of money would increase dramatically.

The Internal Revenue Code exempts approximately 140,000 nonprofit corporations from taxation under section 501(c)(4). *See* Independent Sector at 7. While it is impossible to determine how many of those organizations would be eligible

for an *MCFL* exception under a rule capping the absolute amount of permissible corporate or union support, applying the rule to even a fraction of the 140,000 could allow tens of millions of corporate or union dollars to be spent on federal campaigns. If the general rule allowed more than the $1,000 permitted by the D.C. Circuit in *NRA*, the amount of corporate and union money passing into the federal electoral system could easily reach hundreds of millions of dollars.

A standardized limitation based on absolute size of donations would likely prompt widespread reorganizations that would eliminate any meaningful restrictions. If the law restricts an *MCFL* corporation to receiving up to $1,000 in corporate or union funds, the organization can simply split in two and accept a total of $2,000. Statewide organizations such as North Carolina Right to Life could reorganize and incorporate at the county or municipal level, making each of the new organizations eligible to receive the full maximum amount consistent with its status as an *MCFL* organization. Alternatively, a wealthy corporate executive could finance a newly incorporated nonprofit advocacy group with a personal donation, have the corporation make an appropriately sized contribution from its treasury funds, and funnel all of the corporate money and much of the remaining funds directly into federal elections. The proliferation of qualifying organizations would defeat the limit on how much corporate or union money could be furnished for federal electioneering.

The D.C. Circuit justified applying *MCFL* to groups that receive small amounts of corporate or union money by saying that the donations were "de minimis." *NRA*, 254 F.3d at 179. As this Court implicitly recognized in articulating the three-part *MCFL* test, however, preventing an electioneering organization from accepting truly de minimis sums of corporate or union money violates no constitutional right. Moreover, even de

minimis sums of money, in the aggregate, do matter for the campaign finance structure. This Court should reaffirm that its requirement in *MCFL* of a "policy not to accept contributions from [corporations and unions]" means what it says and does not allow individual small leaks collectively to flood campaigns for federal office. *MCFL*, 479 U.S. at 264.

C. If This Court Weakens *MCFL* by Declining to Enforce a Complete Ban on Corporate or Union Financing of Nonprofit Electioneering, the Expanded Exception Should Be Limited to Small Nonprofits.

If this Court decides to change the *MCFL* standard to allow ideological nonprofit groups to accept some corporate or union money and still benefit from the exemption, *MCFL*'s benefits should be limited to small organizations. The original *MCFL* exception was created at least in part out of concern about the complexity and expense of setting up a separate PAC. *See MCFL*, 479 U.S. at 254-55 (plurality op.); *id.* at 265-66 (O'Connor, J., concurring). That concern is not relevant to groups like North Carolina Right to Life, which already maintains both a PAC and a 501(c)(3) educational charity in addition to the core 501(c)(4) organization, *see* North Carolina Right to Life, "The Organization," http://www.ncrtl.org/organization/ (last visited Dec. 27, 2002), let alone to organizations like the NRA, with its $140 million budget and $13 million PAC. *MCFL*'s reference to the picnics and bake sales that MCFL used to raise money establishes that this Court was not contemplating an exception from campaign finance restrictions for the wealthy political advocacy groups that would be the chief beneficiaries of the Fourth Circuit's expansive rule.

CONCLUSION

For the reasons stated by Petitioner and other supporting *amici*, the decision below should be reversed. In reversing that decision, this Court should also reaffirm that the *MCFL* exception applies only to nonprofit corporations that accept no donations from corporations or unions. Percentage-based rules like the one applied by the Fourth Circuit, or even rules that limit *MCFL* organizations to an absolute amount of corporate or union funding, would allow corporations and unions to funnel millions of dollars through nonprofit groups into federal elections. This Court should make clear that *MCFL* applies only to expenditures, not to contributions, and then only to expenditures made by organizations that refuse all donations from corporations or unions.

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Respectfully submitted,

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